No. 501

Office - Supreme Court, U. S.
FILED
NOV 23 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SIDNEY ZERNIT,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JULIEN CORNELL,
Attorney for Petitioner,
15 William Street,
New York, 5, N. Y.

ERNEST ANGELL,
Attorney for Petitioner,
40 Wall Street,
New York, 5, N. Y.

TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT	1
Statement of Matters Involved	2
Jurisdiction	3
Question Presented	3
Statute Involved	4
Reasons for Allowance of Writ	5
BRIEF IN SUPPORT OF PETITION	9
Opinions Below	9
Jurisdiction	9
Statement of the Case	10
Specification of Assigned Errors	10
ARGUMENT:	
The courts below erred in ruling that petitioner could not show in defense to an indictment charging him with failure to report for induction that the induction order was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940	10
CONCLUSION	11

Table of Cases Cited

PAGE

Baxley v. United States, 134 Fed. 2d 998 (C. C. A. 4th Cir.) 7

Bowles v. United States, 318 U. S. 749, affirmed 319 U. S. 33 ..... 5, 11, 12

Falbo v. United States, ... U. S. ..., 87 L. Ed. 1362 (October Term, 1943, No. 73) 5, 6, 7, 11, 12

Goff v. United States, 135 Fed. 2d 610 (C. C. A. 4th Cir.) 7

Johnson v. United States, 126 Fed. 2d 242 (C. C. A 8th Cir.) 7

Rase v. United States, 129 Fed. 2d 204 (C. C. A. 6th Cir.) 7

Seele v. United States, 133 Fed. 2d 1015 (C. C. A. 8th Cir.) 7

United States v. Bowles, 131 Fed. 2d 818 (C. C. A. 3rd Cir.) 7

United States v. Grieme, 128 Fed. 2d 811 (C. C A. 3rd Cir.) 7

United States v. Kauten, 133 Fed. 2d 703 (C. C. A. 2d Cir. 1942) 2, 3, 7, 11

United States ex rel. Phillips v. Downer, 135 Fed. 2d 521 (C. C. A. 2d Cir. 1943) 3

Other Authorities Cited

Cornell—The Conscientious Objector and the Law, p. 11 6

Judicial Code, Sec. 240(a) (U. S. C., Title 28, Sec. 347a) 3, 9

Selective Training and Service Act of 1940:

50 U. S. C., App., Sec. 301ff 1

Sec. 5g (50 U. S. C., App., Sec. 305g, 54 Stat. 885) 2, 3, 4, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SIDNEY ZERNIT,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Sidney Zernit, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court entered on October 22, 1943 affirming a judgment of the United States District Court for the Southern District of New York entered on February 20, 1943 convicting petitioner of a violation of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 301ff).

Statement of Matters Involved

Petitioner was indicted and convicted for failure and refusal to report for induction into the United States Army pursuant to order of his local draft board in violation of the Selective Training and Service Act of 1940.

At the trial petitioner offered to prove in defense to the indictment (1) that he had duly claimed exemption from military service, both combatant and non-combatant, under Sec. 5g of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 305g), on the ground that he was conscientiously opposed thereto by reason of religious training and belief; (2) that this claim was denied by the local board and by the appeal board, acting upon and adopting the recommendation of the hearing officer who investigated the claim and held a hearing thereon, on the sole ground that although petitioner was conceded to be conscientiously and sincerely opposed to participation in military service, both combatant and non-combatant, he was nevertheless not opposed thereto by reason of religious training and belief as required by the statute; and (3) that in reaching this decision the draft boards erroneously construed the term "religious training and belief" contained in the statute as not affording exemption to one having the beliefs of the petitioner (R. 34-36).

The proof so offered by petitioner was objected to by the government and excluded by the trial judge on the authority of *United States* v. *Kauten,* 133 Fed. 2d 703 (C. C. A. 2d Cir. 1943), the court stating, "I will sustain the objection and make the ruling * * * that disobeying the order of the local board, which is final, is a violation of the Selective Training and Service Act, and therefore I find the defendant guilty" (R. 37).

The petitioner excepted to this ruling and moved to dismiss the indictment on the ground that the induction order which the petitioner was charged with having disobeyed, being based on an error of law in the construction of the statute as aforesaid, was unlawful and void; this motion was denied (R. 37, 38). Petitioner was thereafter sentenced to three years imprisonment (R. 5).

Petitioner, admittedly having conscientious scruples against all military service, could not submit to induction without violating his conscience, and therefore was unable to avail himself of the only remedy open to him under the *Kauten* decision, namely a writ of *habeas corpus* after induction. See *United States ex rel. Phillips* v. *Downer,* 135 Fed. 2d 521 (C. C. A. 2d Cir. 1943). Since he could not in good conscience submit to induction for the purpose of getting a court to review the draft classification which he claimed was based on a mistaken construction of the law, petitioner found himself, under the court's ruling, unable to obtain any judicial review of the illegal order of induction. He was therefor *convicted for violation of an unlawful order, without having had an opportunity to defend himself* by showing the illegality.

Jurisdiction

The jurisdiction of this court is invoked under the Judicial Code, Sec. 240(a) (U. S. C., Title 28, Sec. 347a).

Question Presented

Did the courts below err in ruling that petitioner could not show in defense to an indictment charging him with failure to report for induction that the induction order

was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940?

Statute Involved

It is provided in Section 5g of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 305g, 54 Stat. 885):

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board, shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10(a) 2 (310 [a] [2] of this Appendix). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency,

a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Reasons for Allowance of Writ

The court below has decided an important question of law, which has not yet been settled by this court, although this court has twice granted writs of certiorari to review decisions of lower courts on this same issue. *Bowles* v. *United States*, 318 U. S. 749, and *Falbo* v. *United States*, ... U. S. ..., 87 L. Ed. 1362. The *Bowles* case was affirmed on another ground, 319 U. S. 33, so that the question here presented was not decided. In a dissenting opinion, however, in which Mr. Justice Reed concurred, Mr. Justice Jackson said (319 U. S. 33 at 38):

> "The court does not consider whether one may be convicted for disobeying an invalid order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the court precludes its determination of the question. But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made."

The *Falbo* case is about to be argued in this court, and the decision will presumably control petitioner's case. But even so this case should be reviewed, as the *Falbo* case involves refusal to report for work of national importance by one claiming complete exemption as a minister of religion, whereas the present case involves refusal to report for induction by one claiming exemption from military service as a conscientious objector. Petitioner believes that the difference in the facts in the two cases should not result in any different rule of law being applied, but in order that the lower courts and litigants may be left with no doubt that the *Falbo* decision will apply to the case of a conscientious objector who has refused to report for induction, it is necessary for this court to review and decide this case.

The question presented is one of great importance, involving dangerous and novel inroads on the rights of a defendant in a criminal trial; it is of importance to many persons, as hundreds of conscientious objectors have been imprisoned under the identical circumstances which this case presents;* it is a question which is the subject of

---

* See page 11, "The Conscientious Objector and the Law" by Julien Cornell, The John Day Company, New York, 1943.

sharply conflicting decisions in the several circuits;* and it is a question which cannot be squarely decided in the *Falbo* case which is now before the court, as the facts are different. It is therefore of great importance that the court settle the issue raised here.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this court this cause and a complete transcript of the record and of all proceedings had herein; to the end that this cause may be reviewed by this court; that the judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner may have such other and further relief in the premises as this court may deem appropriate.

Dated: November 12, 1943.

SIDNEY ZERNIT,
Petitioner.

JULIEN CORNELL,
ERNEST ANGELL,
Solicitors for Petitioner.

---

* *United States* v. *Kauten*, 133 Fed. 2d 703 (C. C. A. 2d Cir.);
United States v. *Grieme*, 128 Fed. 2d 811 (C. C. A. 3rd Cir.);
United States v. *Bowles*, 131 Fed. 2d 818 (C. C. A. 3rd Cir.);
Baxley v. *United States*, 134 Fed. 2d 998 (C. C. A. 4th Cir.);
Goff v. *United States*, 135 Fed. 2d 610 (C. C. A. 4th Cir.);
Rase v. *United States*, 129 Fed. 2d 204 (C. C. A. 6th Cir.);
Johnson v. *United States*, 126 Fed. 2d 242 (C. C. A. 8th Cir.);
Seele v. *United States*, 133 Fed. 2d 1015 (C. C. A. 8th Cir.).